

**RECENT CHANGES
TO THE
FAIR LABOR
STANDARDS ACT**

JULY 30, 2004

**Ohio Department of Administrative Services
Human Resources Division**

**Bob Taft, Governor
Scott Johnson, Director
Clare Long, Deputy Director**

Ohio**DAS**

RECENT CHANGES TO THE FAIR LABOR STANDARDS ACT

July 30, 2004

AGENDA

- 8:30 a.m. Registration and Continental Breakfast**
- 9:00 a.m. Welcome and Opening Remarks
Clare Long, Deputy Director
Ohio Department of Administrative Services
Human Resources Division**
- 9:10 a.m. Background on the Fair Labor Standards Act
Sloan Spalding, Assistant Attorney General
Ohio Attorney General's Office, Employment Law Section**
- 9:25 a.m. Overview of Changes
Deborah Archie, Chief Legal Counsel
Ohio Department of Administrative Services**
- 9:40 a.m. Definitions and Exemptions
Christine Emch Thompson, Policy Development Administrator
Robert Patchen, Policy Analyst
Janine Ashanin, Policy Analyst
Ohio Department of Administrative Services
Human Resources Division, Policy Development Section**
- 10:15 a.m. Break**
- 10:30 a.m. Continuation of Definitions and Exemptions**
- 11:30 a.m. Lunch**

AGENDA

- 1:00 p.m. Salary Basis Test
Sloan Spalding, Assistant Attorney General
Ohio Attorney General's Office, Employment Law Section**
- 1:30 p.m. Changes to the Disciplinary Process for Nonexempt Employees
Anne Thomson, Deputy Attorney General
Ohio Attorney General, Employment Law Section**
- 1:50 p.m. Collective Bargaining Issues
Jillian Froment, General Counsel
Ohio Department of Administrative Services
Office of Collective Bargaining**
- 2:20 p.m. Self Audit
Sloan Spalding, Assistant Attorney General
Ohio Attorney General's Office, Employment Law Section**
- 2:40 p.m. Procedures for Changing Exemption
Policy Development Staff
Ohio Department of Administrative Services
Human Resources Division, Policy Development Section**
- 3:00 p.m. Questions and Answers**

Background on the Fair Labor Standards Act

**Sloan T. Spalding
Assistant Attorney General
Ohio Attorney General's Office
Employment Law Section**

Background on the Fair Labor Standards Act

Historical Background and General Introduction to the FLSA

Presented by Sloan T. Spalding, Assistant Attorney General
Ohio Attorney General's Office, Employment Law Section

Historical Background of the Act

After years of struggling with Congress and against a history of judicial opposition to governmental control over the nation's labor standards, President Franklin D. Roosevelt signed into law the Fair Labor Standards Act ("FLSA"), which became effective on October 24, 1938. *29 USC §201 et seq.* In enacting the Fair Labor Standards Act of 1938, Congress declared it to be our national policy to eliminate labor conditions "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."

The FLSA represented a cornerstone of President Roosevelt's "New Deal" legislation, aimed at pulling the country out of the Great Depression. The FLSA was passed at a time when many employers took advantage of tight labor markets to subject workers to horrible conditions and long hours. In its final form, the FLSA applied to industries whose combined employment represented only about one-fifth of the nation's labor force. In these industries, it banned oppressive child labor, set the minimum hourly wage at 25 cents and established a maximum workweek at 44 hours.

An early goal of the FLSA was to create new jobs and employment opportunities for the nation's workers by "encouraging" employers to shorten the workweek while at the same time increasing wages. The Act attempts to limit the number of hours a person can work for two reasons: 1) to spread employment among more people, and; 2) to create and maintain a fixed maximum hourly workweek. The FLSA sought to achieve these aims through a single mandatory device: forced overtime pay. It penalizes employers when employees work longer than 40 hours, and it provides bonus compensation to all employees required to work longer hours. Additionally, employers who elect not to follow the mandates of the Act, face governmental investigations and heavy fines.

In short, Congress and President Roosevelt explicitly wanted to place restrictions on unfair labor practices by creating a financial burden on employers through higher labor costs. It is important to remember that the initial goal of the FLSA was not to "balance" the interests of employers and employees, rather the obligations and burdens imposed by the Act are completely one-sided. **The Act by design is tilted in favor of employees alone.** Thus, given the Act's employee friendly mandate -- to force employers to pay more for overtime hours, any exceptions had to be as narrow as possible to achieve the law's main goals. Since exclusions from overtime defeat the purposes of the Act, they must be drawn narrowly.

Portal-to-Portal Act of 1947

The first major revision to the FLSA came in 1947 following several large judgments against employers for violations of the Act. On May 14, 1947, President Harry S. Truman signed into law an amendment to the FLSA, commonly referred to as the Portal-to-Portal Act. In a special message to Congress, President Truman wrote:

Today I have signed H.R. 2157, the Portal-to-Portal Act of 1947. The primary purpose of this Act is to relieve employers and the Government from potential liability for billions of dollars in so-called "portal-to-portal" claims. These claims have emerged since judicial interpretation of the "Wage and Hour Law" raised the possibility that employers might be required to pay back wages for certain activities which in most industries had not previously been considered by either workers or employers to be compensable. I believe that, in the interest of the economic stability of our Nation, it is essential to clarify this matter by statute.

The Portal-to-Portal Act should end this uncertainty with respect to claims of still undetermined magnitude. Current wage negotiations can proceed more readily to a satisfactory conclusion, and businessmen will be able to plan with assurance for full production and price reductions. This will be of real value to labor and management in the maintenance of a continued high level of employment.

I am confident that the purpose of the main provisions of the Act is to eliminate the immense potential liabilities, which have arisen as the result of the "portal-to-portal" claims. It is not the purpose of the Act to permit violation of our fundamental wage and hour standards, or to allow a lowering of these standards. This is evident from the findings of the Congress set forth in Section I of the Act as to the need for legislation.

The Portal-to-Portal Act was enacted to help give employers greater clarity on wage compensation issues for employee tasks that were historically not paid for, such as underground travel in coalmines and make-ready practices in factories.

Other Notable Updates to the Act

In 1949, the minimum wage was raised for the first time since the passage of the Act in 1938, from 40 cents an hour to 75 cents an hour for all workers. A 1955 amendment increased the minimum wage to \$1.00 an hour with no changes to the Act in terms of covered employees or employers.

In 1961, Congress pushed through the first major expansion to the FLSA's scope in the retail trade sector and increased the minimum for previously covered workers to \$1.15 an hour effective September 1961 and to \$1.25 an hour in September 1963. The amendments extended coverage to employees of retail trade enterprises with sales exceeding \$1 million annually, although individual establishments within those covered enterprises were exempt if their annual sales fell below \$250,000. The concept of enterprise coverage was introduced by the 1961 amendments. Those amendments extended coverage in the retail trade industry from an established 250,000 workers to 2.2 million.

Congress further broadened coverage with amendments in 1966 by lowering the enterprise sales volume test to \$500,000, effective February 1967, with a further cut to \$250,000 effective February 1969. The 1966 amendments also extended coverage to public schools, nursing homes, laundries, and the entire construction industry. Farms were subject to coverage for the first time if their employment reached 500 or more man days of labor in the previous year's peak quarter.

In 1974, Congress included under the FLSA all non-supervisory employees of Federal, State, and local governments and many domestic workers. Two years later, in *National League of Cities v. Usery*, the Supreme Court held that the minimum wage and overtime provisions of the FLSA could not constitutionally apply to State and local government employees engaged in traditional government functions. The minimum wage increased to \$2.00 an hour in 1974, \$2.10 in 1975, and \$2.30 in 1976 for all except farm workers, whose minimum initially rose to \$1.60.

The minimum went to \$2.65 an hour in January 1978, \$2.90 in January 1979, \$3.10 in January 1980, and \$3.35 in January 1981. Under the 1977 amendments, overtime exemption for employees in hotels, motels, and restaurants were eliminated. To allow for the effects of inflation, the \$250,000 dollar volume of sales coverage test for retail trade and service enterprises was increased in stages to \$362,500 after December 31, 1981.

As a result of the Supreme Court's 1985 decision in *Garcia v. San Antonio Metropolitan Transit Authority et.al.*, Congress passed amendments changing the application of FLSA to public sector employees. Specifically, these amendments permit State and local governments to compensate their employees for overtime hours worked with compensatory time off in lieu of overtime pay, at a rate of 1 1/2 hours for each hour of overtime worked.

The 1989 amendments established a single annual dollar volume test of \$500,000 for enterprise coverage of both retail and non-retail businesses. At the same time, the amendments eliminated the minimum wage and overtime pay exemption for small retail firms. Thus, employees of small retail businesses became subject to minimum wage and overtime pay in any workweek in which they engage in commerce or the production of goods for commerce (i.e. every employer). The minimum wage was raised to \$3.80 an hour beginning April 1, 1990, and to \$4.25 an hour beginning April 1, 1991.

In 1990, Congress enacted legislation requiring regulations to be issued providing a special overtime exemption for certain highly skilled professionals in the computer field who receive not less than 6 and one-half times the applicable minimum wage.

The 1996 amendments increased the minimum wage to \$4.75 an hour on October 1, 1996, and to \$5.15 an hour on September 1, 1997. The amendments also established a youth sub minimum wage of \$4.25 an hour for newly hired employees under age 20 during their first 90 consecutive calendar days after being hired by their employer; revised the tip credit provisions to allow employers to pay qualifying tipped employees no less than \$2.13 per hour if they received the remainder of the statutory minimum wage in tips; set the hourly compensation test for qualifying computer related professional employees at \$27.63 an hour; and amended the Portal-to-Portal Act to allow employers and employees to agree on the use of employer provided vehicles for commuting to and from work, at the beginning and end of the work day, without counting the commuting time as compensable working time if certain conditions are met.

Historically, any Congressional tinkering with the FLSA have followed the original purpose of the Act, that being the protection of workers through higher minimum wages, expanding overtime eligibility, and increased governmental regulation. That is one of the reasons why the DOL's new "*Fairpay*" regulations are garnering so much attention. For the first time, employers can at least claim that the regulations are being scaled back to permit greater compensation flexibility.

General Introduction to the Act

The Fair Labor Standards Act establishes a minimum wage, overtime pay allowances, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and in Federal, State, and local governments. The U.S. Department of Labor, Wage and Hour Division has responsibility for administering and enforcing the FLSA.

The FLSA is truly a broad collection of Acts and Statues that impact differently upon certain business entities, employment relationships, and employee positions. The FLSA is extremely technical, carries strong penalties for violations, and in some cases allows for private legal actions by employees who have not been compensated in compliance with the law. Thus, employers are strongly encouraged to familiarize themselves with the requirements of the FLSA.

What is Not Covered by the FLSA?

While the FLSA does set basic minimum wage, overtime pay standards and regulates the employment of minors; there are a number of employment practices that the FLSA does not regulate.

For example, the FLSA does *not* require:

- (1) vacation, holiday, severance, or sick pay;
- (2) meal or rest periods, holidays off, or vacations;
- (3) premium pay for weekend or holiday work;
- (4) pay raises or fringe benefits; or
- (5) a discharge notice, reason for discharge, or immediate payment of final wages to terminated employees.

The FLSA leaves many of the above matters to be worked out by agreement between the employer and the employees or their authorized representatives (i.e., Collective Bargaining Agreements, Employee Handbooks, Personnel Policies, etc.). Additionally, Ohio's own laws and regulations address many of these issues as they relate to State employment.

Overview of Changes

**Deborah Archie
Chief Legal Counsel
Ohio Department of Administrative Services**

OVERVIEW OF CHANGES

1. Raises the minimum salary level test from \$155 per week to \$455 per week (\$23,660 annually);
2. Creates a new exemption for highly compensated employees who earn at least \$100,000 annually and who regularly perform one or more of the exempt duties;
3. Replaces the long and short “duties” tests with a standard duties test;
4. Specifies that employees in certain occupations – public safety and health officials, licensed practical nurses, paralegals – will, generally, be considered non-exempt;
5. Clarifies that the exemptions do not apply to “blue collar” employees, such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers, so long as they are not in management positions;
6. Requires that executive employees have effective authority to hire, fire, promote, or change employee status;
7. Alters the “primary duty” requirement for exempt status to make clear that the emphasis is placed on the principal character of the employee’s job and not on the percentage of time spent performing the primary duty;
8. Recognizes that computer network, Internet, and database engineers and administrators, insurance claims adjusters, and numerous workers in the financial services industry occupy positions directly related to management or general business operations of the employer, thereby making it likely that many such employees are administratively exempt, *provided* they exercise discretion and independent judgment;
9. Acknowledges that the satisfaction of three of the listed factors to determine whether an employee is exercising discretion and independent judgment may be sufficient to meet that test, although a case-by-case analysis is required;
10. Expands the professional exemption to cover “learned” professionals, such as chefs and athletic trainers, among others, and broadening the “artistic” exemption to include “creative” professionals, such as actors and certain types of journalists; and
11. Creates a new exception to the salary basis test for infractions of workplace conduct rules, as well as a new “safe harbor” rule to mitigate improper deductions from pay.

Definitions and Exemptions

**Christine Emch Thompson
Policy Development Administrator**

**Janine Ashanin
Policy Analyst**

**Robert Patchen
Policy Analyst**

**Ohio Department of Administrative Services
Human Resources Division
Policy Development Section**

Changes to the FLSA Regulations
take effect on
August 23, 2004

DEFINITIONS

GENERAL DEFINITIONS

“Primary Duty” (29 CFR 541.700) – Means the principal, main, major or most important duty that the employee performs.

- Must be based on all the facts of the particular case.
- Major emphasis on the character of the employee’s job as a whole.
- Factors include, but are not limited to:
 - o Relative importance of the exempt duties as compared with other types of duties;
 - o The amount of time spent performing the exempt work (Useful, but not the sole test);
 - o The employee’s relative freedom from direct supervision; and
 - o The relationship between the employee’s salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

“Customarily and regularly” (29 CFR 541.701) – Means a frequency that must be greater than occasional but which, of course, may be less than constant.

- Tasks or work that are normally and recurrently performed every workweek.
- Does not include isolated or one time tasks.

“Exempt work” (29 CFR 541.702) – Means all the work described in Sections 541.100 (executive capacity employee), 541.101 (business owner), 541.200 (administrative capacity employee), 541.300 (professional capacity employee), 541.301 (learned professional employee), 541.302 (creative professional employee), 541.303 (teachers), 541.304 (practice of law or medicine), 541.400 (computer employee), and 541.500 (outside sales employee), and the activities directly and closely related to such work. All other work is considered to be “nonexempt” work.

“Directly and closely related” – Means tasks that are related to exempt duties and that contribute to or facilitate performance of exempt work.

- May include;
 - o Physical tasks and menial tasks that arise out of exempt duties;
 - o Routine work without which the exempt employee’s exempt work cannot be performed properly;
 - o Examples include: Recordkeeping; monitoring and adjusting machinery; taking notes; using the computer to create documents or presentations; opening mail for the purpose of reading it and making decisions; and using a photocopier or fax machine.
- Work is not “directly and closely related” if the work is remotely related or completely unrelated to the exempt duties.

EXECUTIVE EXEMPTION DEFINITIONS

“Management” – Includes but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employee’ productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances’ disciplining employees; planning the work; determining the techniques to be used; apportioning the work among employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked or sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

“A customarily recognized department or subdivision” – Is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with a permanent status and function. “A customarily recognized department or subdivision” must have a permanent status and continuing function.

“Two or more other employees” – Means two full-time employees or their equivalent. One full-time and two half-time employees, for example, are equivalent to two full-time employees.

“Particular weight” – Factors to be considered include, but are not limited to, whether it is part of the employee’s job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee’s suggestions and recommendations are relied upon.

ADMINISTRATIVE EXEMPTION DEFINITIONS

“Directly related to management or general business operations” – Refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment. Work “directly related to management or general business operations” includes, but is not limited to, work in the functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities.

“Exercise of discretion and independent judgment” – Involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after various possibilities have been considered.

“Matters of significance” – Refers to the level of importance or consequence of the work performed.

EDUCATIONAL ESTABLISHMENTS ADMINISTRATOR DEFINITIONS

“Performing administrative functions directly related to academic instruction or training” – Means work related to the academic operation and functions in a school rather than to administration along the lines of general business operations. Such academic administrative functions include operations directly in the field of education. Jobs related to areas outside the educational field are not within the definition of academic administration.

“Educational establishment” – Means an elementary or secondary school system, an institution of higher education or other educational institution.

“Other educational establishment” – Includes special schools for mentally or physically disabled or gifted children, regardless of any classification of such school as elementary, secondary, or higher.

LEARNED PROFESSIONAL EXEMPTION DEFINITIONS

“Work requiring advanced knowledge” – Means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. An employee who performs “work requiring advanced knowledge” generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. *Advanced knowledge cannot be attained at the high school level.*

“Field of science or learning” – Includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy, and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but not in a field of science or learning.

“Customarily acquired by a prolonged course of specialized intellectual instruction” – Restricts this exemption to professions where specialized academic training is a prerequisite for entrance into the profession.

The best **prima facie evidence** that an employee meets this requirement is possession of the appropriate academic degree. However, the word “customarily” means that the exemption is also available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employee, but who attained the advanced knowledge through a combination of work experience and intellectual instruction.

OUTSIDE SALES EXEMPTION DEFINITIONS

“Sales within the meaning of section 3(k) of the Act” – Include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property.

“Sale” or “Sell” – Includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

“Services” – Extends the outside sales exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order.

“Away from the employer’s place or places of business” – The employee makes the sale at the customer’s place of business or, if selling door-to-door, at the customer’s home. It does NOT include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Any fixed site, home or office, used by a salesperson as a headquarters of for telephonic solicitations is considered the employer’s place of business, regardless of the employer’s ownership or tenant status to the property. There are exceptions to this designation of an employer’s place of business for hotel rooms on road trips and sales at trade shows of short (i.e., one or two weeks) duration.

EXECUTIVE EXEMPTION

CURRENT

As of August 23, 2004

Long Test	Short Test	New
Paid Salary of at least \$155/week	Paid Salary of at least \$250/week	Paid Salary of at least \$455/week (\$23,660/year)
Must do all of the following:	Must do both of the following:	Must do all of the following:
1. Primary duty to manage either the agency in which employed or customarily recognized department or subdivision of agency;	1. Primary duty consists of managing the agency in which employed or customarily recognized department or subdivision of agency; AND	1. Primary duty is <u>management</u> of the enterprise or <u>a customarily recognized department or subdivision</u> of the enterprise;
2. Customarily & regularly directs the work of two (2) or more other employees;	2. Primary duty includes customary & regular direction of two (2) or more other employees in the agency, department, or subdivision.	2. Customarily & regularly directs the work of <u>two (2) or more other full-time employees</u> or equivalent; AND
3. Authority to hire & fire, or authority to make hire, fire, advancement, promotion recommendations;		3. Authority to hire & fire, or employee's suggestions on hire, fire, advancement, promotion, or other changes must be given <u>particular weight</u> .
4. Customarily & regularly exercises discretionary powers;		
5. Paid strictly on a salary basis; AND		
6. Does not devote more than 20% of normal work in a workweek to activities not directly and closely related to performance of executive work.		

ADMINISTRATIVE EXEMPTION

CURRENT

As of August 23, 2004

Long Test	Short Test	New
<p>Paid Salary of at least \$155/week</p> <p>Must do all of the following:</p> <ol style="list-style-type: none"> 1. Primary duty must be the performance of office or non-manual work directly related to management policies or general business operations of the agency or the agency's clients; 2. Customarily & regularly exercises discretion and independent judgment; 3. Must not devote more than 20% of time worked to activities that are not directly & closely related to the performance of administrative tasks; 4. Paid on a salary basis; AND 5. Must either: (a) regularly & directly assist an employee employed in a bona fide executive or administrative capacity; (b) perform only under general supervision work along specialized or technical lines requiring special training, experience or knowledge; or (c) execute under general supervision special assignments and tasks. 	<p>Paid Salary of at least \$250/week</p> <p>Must do both of the following:</p> <ol style="list-style-type: none"> 1. Primary duty must be the performance of office or non-manual work directly related to management policies or general business operations of the agency or the agency's clients; AND 2. Such duty includes work that requires the exercise of discretion & independent judgment. 	<p>Paid Salary or Fee of at least \$455/week (\$23,660/year)</p> <p>Must do both of the following:</p> <ol style="list-style-type: none"> 1. Primary duty must be the performance of office or non-manual work <u>directly related to management or general business operations</u> of the employer or the employer's clients; AND 2. Primary duty includes the exercise of <u>discretion & independent</u> judgment with respect to <u>matters of significance</u>.

ADMINISTRATIVE EXEMPTION
“Educational Establishment Administrator”

CURRENT

As of August 23, 2004

Long Test	Short Test	New*
<p>Paid Salary or Fee of at least \$155/week, or on a salary basis which is at least equal to the entrance salary for teachers in the school system, educational establishment, or institution by which employed.</p> <p>Must do all of the following:</p> <ol style="list-style-type: none">1. Primary duty must be the performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein;2. Customarily & regularly exercises discretion and independent judgment;3. Must not devote more than 20% of time worked to activities that are not directly & closely related to the performance of administrative tasks;4. Paid on a salary basis; AND5. Must either: (a) regularly & directly assist an employee employed in a bona fide executive or administrative capacity; (b) perform only under general supervision work along specialized or technical lines requiring special training, experience or knowledge; or (c) execute under general supervision special assignments and tasks.	<p>Paid Salary of at least \$250/week</p> <p>Must do all of the following:</p> <ol style="list-style-type: none">1. Primary duty is the performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; AND2. Primary duty includes work requiring exercise of discretion and independent judgment.	<p>Paid Salary or Fee of at least \$455/week (\$23,660/year), or on a salary basis which is at least equal to the entrance salary for teachers in the <u>educational establishment</u> by which employed.</p> <p>Must do the following:</p> <ol style="list-style-type: none">1. Primary duty is <u>performing administrative functions directly related to academic instruction or training</u> in an <u>educational establishment</u> or department or subdivision thereof. <p>*Note – Preamble indicates that except for the change in the dollar figure for the salary basis portion of the test, this amendment was primarily a consolidation of the existing regulations for this exemption into one place with only minor and technical changes.</p>

PROFESSIONAL EXEMPTION

CURRENT

As of August 23, 2004

Long Test	Short Test	New
Paid Salary of at least \$170/week	Paid Salary of at least \$250/week	Paid Salary or Fee of at least \$455/week (\$23,660/year)
Must do all of the following:	May be either of the following:	Must be either of the following:
1. Primary duty either: (a) work requiring knowledge of an advanced type in field of science or learning; (b) original or creative work in an artistic field; or (c) teaching, tutoring, instructing or lecturing as a teacher certified or recognized as such in a school system or educational establishment or institution;	1. Work requiring knowledge of an advanced type in a field of science or learning, or teaching, including work that requires the consistent exercise of discretion & judgment; OR	<i>Learned Professional</i> 1. Primary duty is work which requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction (This is measured by a unique three (3) element test*); OR
2. Time spent on work that is “not an essential part of and necessarily incident to” the exempt professional duties may not exceed 20% of the time worked per week;	2. Work in a recognized field of artistic endeavor, including work that requires invention, imagination, or talent	<i>Creative Professional</i> 1. Primary duty is work, which requires invention, imagination, originality or talent in a field of artistic or creative endeavor.
3. Work must be predominantly intellectual and varied in character as opposed to routine and of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time;		*See next page.
4. Work requires consistent exercise of discretion & judgment; AND		
5. Paid on a salary basis.		

LEARNED PROFESSIONAL – THREE (3) ELEMENT TEST

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1. Employee must perform work requiring advanced knowledge; *
 2. The advanced knowledge must be in a field of science or learning; **AND**
 3. The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.
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*Note: “Advanced knowledge” CANNOT be attained at the high school level. The best *prima facie evidence* that an employee meets this requirement is possession of the appropriate academic degree.

LEARNED PROFESSIONAL EXAMPLES

The following positions generally meet the duties of a learned professional:

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1. Registered or certified medical technologists with the necessary academic training.
 2. Registered nurses registered with the appropriate State examining board.
 3. Dental hygienists with the necessary academic training.
 4. Physician's assistants with the necessary academic training.
 5. Certified public accountants. Accountants that are not CPA's, but who do similar duties may qualify for this exemption.
 6. Chefs with the necessary academic training.
 7. Athletic trainers with the necessary academic training.
 8. Funeral directors and embalmers who are licensed by and work in a state that requires certain academic training.
 9. Teacher who actually teaches at an "educational establishment" by which they are employed.*
 10. Holder of a valid law license that actually engages in the practice of law.*
 11. Holder of a valid medical license that actually engages in the practice of medicine. Also covers interns and residents in a program pursuant to the practice of the medical profession.*
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*Note: Monetary requirements do not apply to these types of employees

The following positions are generally not going to meet the duties requirement of a learned professional:

-
1. Licensed practical nurse.
 2. Paralegals.
 3. Cooks who perform predominantly routine mental, manual, mechanical or physical work.
 4. Account clerks.
 5. Bookkeepers.
-

CREATIVE PROFESSIONAL EXAMPLES

The following positions generally meet the duties of a creative professional:

-
1. Actor.
 2. Musicians.
 3. Composers.
 4. Conductors.
 5. Soloists.
 6. Painters who at most are given the subject matter of the painting.
 7. Cartoonists who are merely told the title or underlying concept of a cartoon and must rely on their own creative ability to express the concept.
 8. Essayists, novelists, short-story writers and screenplay writers who choose their own subjects and hand in a finished piece of work to their employers (the majority of such persons are, of course, not employees but self-employed).
 9. Persons holding more responsible writing positions in advertising agencies.
 10. Journalist, if their primary duty is work requiring invention, imagination, originality or talent, as opposed to work which depends primarily on intelligence, diligence and accuracy.
-

The following positions are generally not going to meet the duties requirement of a creative professional:

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1. Copyist.
 2. “Animator” of motion picture cartoons.
 3. Retoucher of photographs.
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COMPUTER EMPLOYEE EXEMPTION

CURRENT

As of August 23, 2004

Not found in the current regulations. Only found in the statute at 29 U.S.C. 231(a)(17). This amendment to the statute was added in 1996. The language in the statute is almost identical to the language soon to be incorporated into the regulations.

If the employee is not compensated at an hourly rate of at least \$27.63/hour, then they must meet the salary basis test.

Compensated either on a salary or fee basis of at least \$455/week (\$23,660/year) or, if compensated on an hourly basis, at a rate of not less than \$27.63/hour

Primary duties must consist of:

1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
 2. The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
 3. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; **OR**
 4. A combination of the aforementioned duties, the performance of which requires the same level of skills.
-

Note: Computer employees can be exempted if they meet the requirements of the learned professional exemption, or under the specific computer employee exemption discussed above. The Preamble specifically mentions that because job titles vary widely and change quickly in the computer industry, job titles are NOT determinative of the applicability of the exemption. Additionally, the regulations specifically provide that the exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment.

OUTSIDE SALES EXEMPTION

CURRENT

As of August 23, 2004

Must do both of the following:

1. Employed for the purpose of and who is customarily and regularly engaged away from his employer's place of business in:
 - (a) Making sales within the meaning of section 3(k) of the act, or
 - (b) Obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; **AND**
 2. Whose hours of work of a nature other than that described in paragraph 1. above in this test, do not exceed 20% of the hours worked in a workweek by nonexempt employees of the employer. Work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as nonexempt work.
1. Primary duty is:
 - (a) Making sales within the meaning of section 3(k) of the Act, or
 - (b) Obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; **AND**
 2. Customarily & regularly engaged away from the employer's place or places of business in performing such primary duty.

Note: Salary basis requirements do not apply to outside sales employees. Drivers who sell may or may not qualify for this exemption. Each such situation needs to be examined closely and particular attention given to the guidance and direction on this topic found at 29 C.F.R. 541.504.

HIGHLY COMPENSATED EMPLOYEE EXEMPTION

Totally New as of August 23, 2004

-
1. Employee must earn an annual compensation of \$100,000 or more, which includes at least \$455/week paid on a salary basis;
 2. Primary duty is the performance of office or non-manual work; *AND*
 3. Customarily & regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative, or professional employee.
-

“BLUE COLLAR” WORKER CLARIFICATION

29 C.F.R. 541.3(a) provides:

(a) The section 13(a)(1) exemptions and the regulations in this part do not apply to manual laborers or other “blue collar” workers who perform work involving repetitive operations with their hands, physical skill and energy. Such nonexempt “blue collar” employees gain the skills and knowledge required for performance of their routine manual and physical work through apprenticeships and on-the-job training, not through the prolonged course of specialized intellectual instruction required for exempt learned professional employees such as medical doctors, architects and archeologists. Thus, for example, non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, and laborers are entitled to minimum wage and overtime premium pay under the Fair Labor Standards Act, and are not exempt under the regulations in this part no matter how highly paid they may be.

Note: Preamble explains that this is not a change, but merely a clarification due to misunderstandings about the application of the exemptions to these types of positions. This amendment was created to clarify these types of positions do not fit the tests for any of the exemptions.

“FIRST RESPONDER” CLARIFICATION

29 C.F.R. 541.3(b)(1) provides:

(b)(1) The section 13(a)(1) exemptions and the regulations in this part also do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole and probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform such work as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

Note: 29 CFR 541.3(b)(2)-(b)(4) explains why these types of employees do not qualify for the executive, administrative, or professional exemptions. The Preamble explains that these types of employees have been the subjects of past litigation, with most courts finding that they are not exempt because they cannot meet the elements of the current exemption tests. Additionally, the Preamble indicates that such employees cannot be exempted under the new “highly compensated” test because that test only applies to employees whose primary duty includes performing office or non-manual work, and the courts have already indicated that these types of employees do not perform “office or non-manual” work. High-ranking police and fire officials are probably still exempt under the new regulations, because their primary duty is to manage the operation, rather than to actually respond to a call. The discretion for such an employee to respond to a call or not, is mentioned as a factor to consider for these high-ranking type employees.

DISCIPLINARY SUSPENSIONS

CURRENT

1. Unpaid disciplinary suspensions for violations other than “infractions of safety rules of major significance” were only possible in full workweek increments.

As of August 23, 2004

1. Unpaid disciplinary suspensions for violations other than “infractions of safety rules of major significance” will be possible in one or more full day increments if:

- A. Imposed in good faith;
 - B. The infraction is of a workplace **conduct** rule*;
 - C. The rule must be imposed pursuant to a written policy; and
 - D. The written policy must be applicable to all employees.
-

*Note: The Preamble to the regulations emphasizes that the term “workplace conduct” is NOT to be construed expansively. Additionally, the Preamble provides that the term is intended to refer to conduct, NOT performance or attendance issues. These statements are made even though earlier in the Preamble it is indicated that the Department of Labor believes this to be “a common-sense change that will permit employers to hold exempt employees to the same standards of conduct as required of the nonexempt workforce.” These statements appear to be contradictory, at least in a government employment setting, where less than full workweek incremental suspensions are very common for dealing with performance and attendance issues for nonexempt employees. It is unclear at this time exactly what type of “workplace conduct rules” will allow for suspensions in one or more full day increments without violating the salary basis requirement for an FLSA exemption.

Salary Basis Test

**Sloan T. Spalding
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The Salary Basis Test –

Sloan T. Spalding, Assistant Attorney General
Ohio Attorney General's Office, Employment Law Section

Step one in an FLSA exemption determination: The Salary Basis Test –

As we all know, certain employees are “exempt” from the overtime requirements of the FLSA based in part upon their actual duties performed – the duties test. However, often overlooked is that the fact that an exemption determination is a two-step process. The first question to be answered should be – is the employee paid on a salary basis?

An employee is paid on a salary basis if the employee regularly receives a predetermined amount constituting all or part of his compensation, which meets the statutorily determined “salary level” (salary level is discussed below). This salary amount cannot be subject to reduction because of variations in the quality or quantity of work performed. Thus, the exempt employee must receive a full week's salary for any week in which he performs work regardless of variations in the quality or quantity of work performed – subject to the permissible deductions highlighted below.

Highlight of Updates to the Salary Basis Test – 29 CFR 541.602

The new Fair Pay regulations preserve the “salary basis test” used to determine exemptions under the FLSA, along with the permissible deductions. Thus docking of pay from salaried employees without destroying the exemption remains permissible for: absences from work for a full day for personal reasons, other than sickness or disability; for absences of a full day occasioned by sickness or disability in accordance with valid plan, policy, or practice providing wage replacement benefits for such absences; to offset jury or witness fees or military pay received by the employee; for penalties imposed in good faith for infractions of major safety violations; for hours not worked in the first of last weeks of employment; or for hours taken as unpaid leave under the FMLA.

An important change under the new regulations concerns deductions for infractions of workplace rules or improper conduct (as discussed in more detail later in this Seminar). Under the Fair Pay regulations, employers are now allowed to suspend an exempt employee in full-day increments that need not be a full week in duration. In other words, for certain workplace violations and employer can suspend an employee for five days or less, without destroying the exemption (see 29 CFR 541.602(b)(5)). Under the old rules, employees were advised to only use disciplinary suspensions for exempt employees in five-day blocks (a full workweek). Of course, the DOL is going to be keeping a close eye on what employers are deeming to be workplace rules violations and to be safe for now, employers should limit using suspensions of less than a work week for confirmed violations of serious workplace rules (sexual harassment, workplace violence, etc), and not just attendance problems.

Improper Deductions From an Exempt Employee's Salary – 29 CFR 541.603

According to the DOL, there are several circumstances in which the employer may make deductions from an exempt employee's salary without destroying the exemption. Deductions from pay are generally permissible when an exempt employee: is absent from work for one or more full days for personal reasons other than sickness or disability; for absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness; to offset amounts employees receive as jury or witness fees, or for military pay; for penalties imposed in good faith for infractions of safety rules of major significance; or for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions. Also, an employer is not required to pay the full salary in the initial or terminal week of employment, or for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act.

To recap a few of the more notable deductions, an employee must receive his full salary for any week in which he works regardless of the days or hours worked, unless:

The employee is absent the entire workweek or performs no work during that workweek. 29 CFR 541.118(a);

The employee is absent from work for a day or more due to personal reasons other than sickness or accident. 29 CFR 541.118(a)(2);

The employee is absent for a day or more caused by sickness or disability and a deduction is made in accordance with a bona fide plan, policy, or practice providing for loss of salary occasioned by sickness and disability. 29 CFR 541.118(a)(3);

The employer imposes a good faith penalty for a major safety violation. 29 CFR 541.118(a)(5);

The employer issues a disciplinary suspension for a full day or more for the employee's violation of a serious workplace misconduct policy. 29 CFR 541.602(a); or

Under the public accountability rule, public employers can deduct for an absence were the employee has no leave to cover the time off, took time off without permission, or agreed to take leave without pay. 29 CFR 541.710

An employer can lose the exemption if it has an "actual practice" of making improper deductions from salary. Factors the DOL will consider when determining whether an employer has an actual practice of making improper deductions include, but are not

limited to: the number of improper deductions, particularly as compared to the number of employee infractions warranting deductions; the time period during which the employer made improper deductions; the number and geographic location of both the employees whose salary was improperly reduced and the managers responsible; and whether the employer has a clearly communicated policy permitting or prohibiting improper deductions. If an “actual practice” is found, the exemption is lost during the time period of the deductions for employees in the same job classification working for the same managers responsible for the improper deductions (i.e. the employer makes a mistake with one employee, and the exemption is lost for the entire job classification – so be careful).

Isolated or inadvertent improper deductions will not result in loss of the exemption if the employer reimburses the employee for the improper deductions under the safeharbour provisions of the Act. In other words, if an employer learns of an impermissible deduction, reimburse the employee right away.

Also, please be aware that Ohio law also has a few notable laws regarding wage deductions:

R.C. 4113.15 -- requires Ohio employers to make wage payments on at least a semimonthly basis.

R.C. 4113.19 – prohibits an employer “without an express contract with the employee” from deducting from or retaining any part of the employee’s wages for “wares, tools or machinery destroyed or damaged.” This has been interpreted to include money owed to the employer or cash from a shorted register.

R.C. Chapter 2716 and RC Chapter 3113 governing court ordered garnishment of employee wages.

Highlight of Updates to the Salary Level Test -- 29 CFR 541.600

According to the DOL, raising the salary level test to \$455 will strengthen overtime protection for more than 6.7 million salaried workers who were exempt previously because they received a salary of \$155 or more (but less than \$455 per week). Regardless of whether or not these employees’ duties would traditionally make them exempt under the FLSA, any employee paid less than \$455 per week will now be entitled to overtime pay when working over 40 hours in a work week. The DOL believes that increasing the salary level will make it easier for employers to determine just which employees are exempt under the Act – only time will tell.

Highly Compensated Employees -- 29 CFR 541.601

A new wrinkle under the Fair Pay regulations is the creation of an exemption for so-called “*highly compensated employees*.” Employees with total compensation of at least \$100,000 per year will be considered exempt from the FLSA and overtime wages if:

- ❑ They make at least \$455.00 per week (remember that each work week stands alone), which equates to \$23,660 per year (52 weeks);
- ❑ They perform office or non-manual labor; and,
- ❑ They customarily and regularly perform any one or more of the exempt duties of an executive, administrative, or professional employee.

The duties portions of this exemption are clear: the employee must not be a non-management production worker (i.e. highly compensated blue collar workers are still entitled to overtime).

Compensation that can be considered in reaching the \$100,000 threshold for this special exemption are:

- ❑ Earned commissions;
- ❑ Nondiscretionary bonuses;
- ❑ Other nondiscretionary compensation earned during the year.

Compensation that may not be used to reach the threshold include:

- ❑ Reimbursement for business related expenses;
- ❑ Payments for medical or life insurance;
- ❑ Contributions to retirement plans or other benefit programs.

According to a fair reading of the new regulations, an employer may be able to make-up the salary of an employee who might meet this exemption, but who is just a few dollars short of \$100k, by paying the employee the extra money needed to hit the threshold during the last month of the fiscal year.

Public Accountability Rule and the Salary Basis Test - 29 CFR 541.710

During a growing wave of costly private lawsuits filed by public employees against their employers challenging their exempt status, a series of court decisions were issued that sharply limited public employers' ability to successfully claim exemption under the "salary basis" rule. Which as discussed above, you the employer cannot establish that the employee is paid on a salary basis (the first part of the exemption test) then the employer will not be able to establish a valid exemption from the Act. As you might all realize, almost every State of Ohio employee is assigned an hourly wage rate and is only paid for hours worked or for which leave is used to supplement. This reality makes it a bit hard to satisfy the salary basis test.

Realizing the potentially disastrous consequences of finding almost every public employee to be paid on an hourly basis under the Act, the DOL modified the "salary basis" rule to provide specific relief to public employers based on principles of public accountability. 29 CFR § 541.5d, issued in August 1992 (57 FR 37666; Aug. 19, 1992). Under this "public accountability" rule, the fact that a public sector pay and leave system included partial-day deductions from pay for absences not covered by accrued paid leave became irrelevant to determining a public sector employee's eligibility for exemption.

Thankfully, the public accountability rule has been carried over into the Department's proposed *Fairpay* rules, at § 541.709 (68 FR 15597; March 31, 2003) and is included in the final published rule at § 541.710. In the preamble to the new regulations, the DOL notes that:

The language in new section 541.710 is from the current section 541.5(d), and the reasons for its promulgation were explained in 57 FR 37677 (August 19, 1992) and continue to be valid. The Department received comments from public employers and employees during the current rulemaking addressing many of the provisions of the entire proposal, including the salary basis of payment. None of their comments, however, addressed the constitutional or statutory public accountability requirements in the funding of state and local governments that was the original rationale for this particular provision. **The Department continues to believe this is a necessary exception to the salary basis requirement for public employees, and it is included in the final regulations.**

Thus, based upon the public accountability rule, governmental employers are permitted to reduce an employee's salary if that employee has worked less than 40 hours in the workweek, so long as the terms of the rule are met.

29 CFR 541.710 -- Employees of public agencies.

(a) An employee of a public agency who otherwise meets the salary basis requirements of § 541.602 shall not be disqualified from exemption under §§ 541.100, 541.200, 541.300 or 541.400 on the basis that such employee is paid according to a pay system established by statute, ordinance or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because of illness or injury of less than one work-day when accrued leave is not used by an employee because:

- (1) Permission for its use has not been sought or has been denied;

(2) Accrued leave has been exhausted; or

(3) The employee chooses to use leave without pay.

(b) Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.

Changes to the Disciplinary Process for Nonexempt Employees

Anne Thomson
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Ohio Attorney General's Office
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Changes to the Disciplinary Process for Nonexempt Employees

Anne E. Thomson, Deputy Attorney General
Office of the Ohio Attorney General, Employment Law Section

Disciplinary suspensions under the current FLSA rules.

Under the current rules, the situations in which an employer can suspend an exempt employee in less than one-week increments are severely limited. The regulations only allow suspensions for less than one full week for “infractions of safety rules of major significance.” 29 C.F.R. § 541.118(a)(5). By way of example, the DOL issued an opinion letter on this issue noting that:

Safety rules of major significance embrace those intended to prevent serious danger to the workplace or to other employees, including smoking in explosives plants, oil refineries, and coal mines. This has also been construed to cover industrial security regulations promulgated by a government agency.

Wage and Hour Opinion Letter, March 29, 1991.

Under the current FLSA rules, by issuing a disciplinary suspension that is less than a full week the employer runs the risk of destroying the employee’s exemption under the Act. By doing so, the employee could then be potentially eligible to collect overtime wages for those workweeks in which that exemption was destroyed and possibly more. Obviously, this is not a risk that most employers are willing to take.

Consistent progressive discipline under the new *Fairpay* regulations.

The DOL’s updated “*Fairpay*” Regulations add a new and significant exception that permits “unpaid disciplinary suspensions of one or more full days to be imposed in good faith for infractions of workplace conduct rules. 29 CFR 541.602(a); see also 29 CFR 541.710 for public sector employees. The DOL claims that the goal of this change in the FLSA is to allow employers to apply the same progressive disciplinary rules to both exempt and nonexempt employees. Further, this update is needed to assist employers in complying with both state and federal laws requiring employers to take appropriate remedial action to address certain employee misconduct.

The DOL’s comments on the changed regulations make it clear that “workplace conduct” leading to suspensions should be narrowly construed to mean serious misconduct like sexual harassment, workplace violence, drug or alcohol infractions, or violations of state or federal laws. The regulations do not make mention of general performance or attendance issues as meeting this new standard. Importantly, this new disciplinary exception ***only*** applies if the suspension is pursuant to a written policy that

is generally applicable to all employees and which places employees on notice that certain acts of misconduct could result in an unpaid disciplinary suspension. While the employer’s policy does not need to have an exhaustive list of possible infractions that could lead to a disciplinary suspension, the policy should be sufficient enough to put the employees on notice as to the types of conduct that could lead to discipline.

Overview

Here is a brief side-by-side comparison of the rules under the current FLSA and the new *Fairpay* regulations, as they relate to disciplinary suspensions.

Current FLSA Regulations	New <i>Fairpay</i> Regulations
<p>Unpaid disciplinary suspensions for violations other than “infractions of safety rules of major significance” are <u>only</u> permissible when the suspension is given in full workweek increments.</p>	<p>Unpaid disciplinary suspensions for violations other than “infractions of safety rules of major significance” <u>will be</u> permissible in one or more full day increments, were:</p> <ol style="list-style-type: none"> 1) Imposed in good faith, 2) The infraction is of a serious workplace conduct rule. 3) The work rule is applicable to all employees, and 4) The work rule is part of a published, disseminated, written policy.

Impact on State of Ohio Employers

Pursuant to the new *Fairpay* regulations, after August 23, 2004, employers will be allowed to issue disciplinary suspensions to salaried exempt employees without running afoul of the FLSA and destroying the employees overtime exemption. However, we can only assume that the DOL will be closely monitoring employer’s use of these types of suspensions to assure that they conform to the intention of the regulations – progressive discipline for violations of serious workplace rules. As with any new federal law, it will take years of administrative and court interpretations before we truly understand the parameters of the regulations – so proceed cautiously for now in deciding what constitutes a violation of a serious workplace conduct rule.

Collective Bargaining Issues

**Jillian Froment
General Counsel
Ohio Department of Administrative Services
Office of Collective Bargaining**

Collective Bargaining Issues

APPLICABLE STANDARDS FOR BU EMPLOYEES

FLSA minimum standards can be exceeded, but not waived or reduced.

State or municipal laws, regulations, or ordinances may establish higher minimum wage or lower maximum workweek than established under FLSA.

CBA may provide a higher wage, shorter workweek, higher OT premium than FLSA.

State laws or CBA provisions may not wave provisions of the FLSA.

Neither FLSA nor Part 541 reg. relieves employers from contractual obligations of CBA.

Relation to Other Rules

Rule of thumb: When the FLSA, state laws and collective bargaining agreements apply, the rule setting the most restrictive standard must be observed.

Standards Governing Overtime Eligibility

	Collective Bargaining Agreement	FLSA and Ohio Revised Code	Agency Policy and Procedure
Bargaining Unit Employees	√	√	√
Non-Bargaining Unit, FLSA Eligible Employees		√	√
Non-Bargaining Unit, FLSA Exempt Employees			√

CBA DOES NOT RELIEVE OBLIGATIONS OF FLSA

OCSEA - 13.07 "...in the event the Employer has determined the need for overtime..."

District 1199 - 24.03 "...when the agency determines that overtime is necessary..."
"...the agency reserves the right to schedule and approve overtime."

OEA - 23.06 "...need for, scheduling, and requiring overtime are exclusively Employer rights." "Employees shall be compensated for any authorized hours in active pay status..."

FOP - 22.07 "...management reserves the right to assign employees to work overtime as needed."

An employee's failure to meet a contractual provision or departmental policy may be a defense to a grievance, and does not eliminate the employer's FLSA requirement to pay.

FLSA DOES NOT RELIEVE OBLIGATION OF CBA

Many bargaining unit positions may have duties that qualify them as FLSA exempt:
Learned Professionals, i.e., Doctors, RNs and Teachers
Computer Professionals

However, CBA will still require payment of overtime:

OCSEA 13.10 - "All employees...shall be compensated for overtime work..."

CBA provisions and departmental policy must be met.

Additionally, CBAs may provide for callback pay and standby pay

APPLICATION OF CBA MAY INVALIDATE AN EXEMPTION BY VIOLATING THE SALARY TEST

Salary Test can be violated by overtime pay, callback pay, standby pay and discipline in less than week increments for performance or attendance issues.

Self Audit

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Ohio Attorney General's Office
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Self Audits

The Basics on How to Conduct an In-house FLSA Audit

Sloan T. Spalding, Assistant Attorney General
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Undeniably, the single largest area of potential "employment" liability for State of Ohio employers comes from violations of the FLSA. While most Ohio agencies and departments have well thought out and implemented plans for responding to a fire, tornado or other act of God, how many of you have a "fire drill" in place for responding to a wage and hour disaster? Odds are, not many. An ounce of prevention is worth a pound of cure – especially when facing potential US Department of Labor wage and hour audit.

Under the new *Fairpay* regulations, it is even more critical that employers be proactive in their approach to these issues. While it remains to be seen, many commentators have speculated that the enhanced "safe harbor" provisions of the new regulations will give diligent employers an opportunity to correct slight violations to the FLSA and avoid a mountain of exposed liability. Also, if you discovery some problem areas, a new change in the law is a great time to make changes without tipping off a group of employees that they have been improperly classifieds as exempt for the past 12 years.

Safe Harbor

Under the Fairpay's safe harbor provision, if an employer (1) has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism, (2) reimburses employees for any improper deductions, and (3) makes a good faith commitment to comply in the future, the employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing the improper deductions after receiving employee complaints.

Self Audit Tips

Unfortunately, there is no magic formula for conducting a self-audit. Rather, each employer has a unique set of issues, employees, policies and obligations under the Act. However, at a minimum an audit should attempt to address the following issues:

- ❑ Make sure that upper management is fully aware how important it is that your organizations remain compliant with the FLSA.
- ❑ Conduct manager level training on the new FLSA regulations so that everyone responsible for Applying and enforcing the regulations are aware of the new rules.

- ❑ Review each employee's actual job duties and classification as exempt or non-exempt under the updated regulations to assure that they are properly classified. Be conservative with applying the exemptions and make adjustments as necessary.
- ❑ Update job descriptions and positions postings regularly. For exempt positions, ensure that job descriptions include duties that actually meet the "duties" test of the applicable exemption.
- ❑ Review FLSA's record-keeping requirements and maintain updated and accurate information as required by the Act.
- ❑ Assure that your timekeeping system is accurately recording the "hours worked" for each employee and that they are then fully compensated for all hours worked in accordance with the Act.
- ❑ Prominently display the DOL's required FLSA poster in the workplace. If you need copies of employment posters, check out the DAS website for contact information on how to obtain copies.
- ❑ Review rules regarding what is considered "working time" under the FLSA and ensure that non-exempt employees accurately record hours worked. Pay particular attention to lunch breaks, which to be uncompensated must be for thirty uninterrupted minutes (i.e., not at the employees desk or work station).
- ❑ Ensure correct calculation of overtime hours and compensation.
- ❑ Be very careful when entering into agreements for independent contractors. Periodically review the status of independent contractors to ensure they are correctly paid as independent contractors rather than employees.
- ❑ Ensure that employees who complain of FLSA violations are not subject to retaliation and that when a valid error has been discovered, the employee is properly compensated and the practice corrected to prevent future occurrences.

Procedures for Changing Exemption

**Policy Development Staff
Ohio Department of Administrative Services
Human Resources Division**



MEMORANDUM

To: Chief Legal Counsel & Human Resource Administrators of all State Agencies,
Departments, Institutions, Boards and Commissions

From: Clare N. Long, Deputy Director
Human Resources Division
Department of Administrative Services

Date: July 30, 2004

Re: Guidelines for Certifying Employees as Overtime Exempt

Each state agency is required to submit to the DAS Human Resources Division a list of positions that have been designated as overtime exempt. To be properly designated as overtime exempt, which means one is exempted from the overtime provisions of the federal Fair Labor Standards Act (FLSA), positions must meet certain criteria established by the FLSA. Below are guidelines that will help you to identify overtime-exempt positions. Please note that these guidelines are only meant to assist you, individual entities are responsible for making the specific determinations, not the Department of Administrative Services.

1. In general, full-time positions that are exempt from a bargaining unit and are executive, administrative, professional, or highly compensated may be designated as overtime exempt.
2. Job titles are not sufficient to determine whether a position is overtime exempt. To determine whether the duties of a position are executive, administrative, professional, or highly compensated, an agency must compare the actual duties of the position to the requirements of each of the categories summarized below.

Executive Exemption: Applicable to employees who are paid a salary of \$455 per week or \$23,660 per year and: (1) whose primary duty is management of the enterprise or a customarily recognized department or subdivision of the enterprise; (2) who customarily and regularly direct the work of two or more other full-time employees or equivalent; **and** (3) who have the authority to hire and fire, or person's suggestion on hire, fire, advancement, promotion, or other changes must be given particular weight.

Administrative Exemption: Applicable to employees who are paid a salary of \$455 per week or \$23,660 per year and: (1) whose primary duty is the performance of

office or non-manual work directly related to management or general business operations of the employer of the employer's clients; **and** (2) whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Professional Exemption: There are numerous types of professional exemptions. The most relevant ones are listed below. For each category the employee must be paid a salary of \$455 per week or \$23,660 per year.

Creative professionals: (1) primary duty is work that requires invention, imagination, originality, or talent in a field of artistic or creative endeavor.

Learned professionals: (1) primary duty is work that requires knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. This determination is made by using a three-element test: (a) employee must perform work requiring advanced knowledge; (b) the advanced knowledge must be in a field of science or learning; **and** (c) the advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction. [Advanced knowledge cannot be attained at the high school level.]

*Computer employees: This group may be compensated either on a salary or fee basis. The employee's salary must be at least \$455/week or \$23,660 per year. If compensated on an hourly basis, the hourly rate may not be less than \$27.63/hour. Primary duties must consist of: (1) applying systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications; (2) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; (3) the design, documentation, testing, creation or modification of computer programs related to machine operating systems; **or** (4) a combination of the aforementioned duties, the performance of which requires the same level of skills. [Does not include employees engaged in the manufacture or repair of computer hardware and related equipment.]

(*Computer employees can be exempted if they meet the more broad requirements of the learned professional exemption, or under this specific computer employee exemption.)

Highly Compensated: Applicable to employees who: (1) earn an annual compensation of \$100,000 or more, which includes at least \$455/week paid on a salary basis; (2) have the primary duty of office or non-manual work; **and** (3) customarily and regularly perform at least one of the exempt duties or responsibilities of an exempt executive, administrative, or professional employee.

3. Only salaried positions can be designated as overtime exempt under the FLSA. State employee exemptions are based on the assumption that such employees are treated as

salaried employees, despite the fact that state pay schedules include hourly rates at all levels.

4. Once it is determined which positions are overtime exempt, a human resources official or other person with signature authority should complete a Certification Letter, a copy of which is attached, to be submitted with the list of overtime-exempt positions. This form certifies that the job duties of each position listed have been reviewed and the signing authority has verified that the duties of that position meet the FLSA overtime-exemption criteria. Lists submitted without this certification will not be considered official and will be returned to the agency for completion of the certification.
5. Overtime-exempt lists must include the Position Control Number (PCN) and FLSA exemption category for each position included on the list. Overtime-exempt lists are to be submitted to your agency's human resource analyst at:

Office of State Services
DAS/Human Resources Division
100 East Broad Street, 17th Floor
Columbus, OH 43215

6. Whenever a position that is exempt from collective bargaining is created or reclassified, a review of the position utilizing the FLSA criteria mentioned above should be conducted. If it is determined that the duties exempt the position from overtime, a certification letter should be sent to DAS following the process above. Overtime at the rate of time and one-half will be paid to anyone filling a position until DAS has been notified of the overtime-exempt status.

If you have questions regarding the designation of a position as overtime exempt, please contact Policy Development at (614) 752-5393.

Attachment

SAMPLE

Certification Letter

Date

(Name, Title)

**DAS/Human Resources Division
Rhodes State Office Tower
100 East Broad Street, 17th Floor
Columbus, OH 43266-0405**

Dear _____:

We hereby certify that the employees on the attached list have been evaluated pursuant to FLSA guidelines and have been determined to be overtime exempt. Employees are listed by name, exemption category, and position control number. We further certify that in reviewing each employee's status, we completed the evaluation based on the job duties and not classification title alone.

These reviews were completed on _____, 20 ____, and all affected employees have been notified of their status.

Sincerely,

Personnel Officer

**Director, Deputy Director
Or Administrator**

Federal Register

Regulations

To obtain a copy of the Federal Register Regulations discussed in the seminar, please visit the following pages on the U.S. Department of Labor's FairPay Web site:

Preamble: <http://www.dol.gov/esa/regs/compliance/whd/fairpay/preamble.htm>

Regulations: <http://www.dol.gov/esa/regs/compliance/whd/fairpay/regulations.htm>

Economic Report: <http://www.dol.gov/esa/regs/compliance/whd/fairpay/econreport.htm>